

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAMELA COOPER

Claimant

VS.

MID-AMERICA DAIRYMEN

Respondent

AND

HOME INSURANCE COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 177,407

ORDER

Claimant and respondent both appeal from an Award entered by Special Administrative Law Judge Douglas F. Martin dated April 1, 1996, as modified by Order Nunc Pro Tunc dated April 30, 1996. The Appeals Board heard oral argument September 10, 1996.

APPEARANCES

Claimant appeared by and through her attorney, Patrick R. Nichols of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, John David Jurcyk of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Bruce Brumley of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award. The Appeals Board also has adopted the stipulations listed in the Award.

ISSUES

On appeal, claimant and respondent both ask for review of the findings relating to the nature and extent of claimant's disability. In addition, the respondent submits the following issues for review by the Appeals Board:

- (1) Whether claimant met with personal injury by accident arising out of and in the course of her employment with respondent and, if so, the date of the accident.

- (2) Whether respondent must be prejudiced by lack of notice for injuries after July 1, 1993.
- (3) Whether claimant is entitled to temporary total disability from August 27, 1993, to February 1, 1994.
- (4) What is the nature and extent of claimant's injury?
- (5) Whether claimant is entitled to unauthorized medical expenses and, if so, whether Dr. Zimmerman's testimony should be stricken.
- (6) Whether respondent should be required to bear the cost of the independent medical examination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds claimant has an 85 percent permanent partial general disability.

(1) The Appeals Board finds claimant did suffer personal injury by accident arising out of and in the course of her employment with respondent on June 10, 1994. This conclusion is not absolutely compelled by the rationale in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), as claimant left work from a layoff, not because of her injury. The evidence establishes, however, that claimant continued to worsen after she returned to work. The last day worked becomes the logical date of accident. The key factor is the last date of accident is after July 1, 1993, when there were changes in Kansas Workers Compensation law, including changes in the definition of work disability.

(2) Respondent argues that the Special Administrative Law Judge applied an improper standard when he found that there was no evidence of prejudice from lack of notice. As respondent points out, pursuant to amendments effective July 1, 1993, prejudice is not a factor. Pursuant to the amendments in 1993, claimant must give notice within ten days or show just cause for failure to do so. K.S.A. 44-520.

The Appeals Board agrees the Special Administrative Law Judge applied an incorrect standard. However, the Appeals Board also finds from the evidence that claimant did give notice certainly prior to June 10, 1994. The claim, therefore, is not barred by failure to give notice.

(3) Respondent disputes the award of temporary total disability benefits for the period August 27, 1993, to February 1, 1994. The Appeals Board agrees that the evidence does not meet claimant's burden of establishing that she is entitled to temporary total disability benefits for this entire period. Claimant testified that her last day of work was August 27, 1993. She then testified that she returned to work sometime in November 1993, but does not give a date. The Appeals Board, therefore, awards temporary total disability benefits from August 27, 1993, to November 1, 1993. Claimant then underwent surgery on November 26, 1993, for carpal tunnel on the left. Claimant testified that she returned to work sometime in December but again does not state the date. The Appeals Board, therefore, awards benefits from the date of surgery, November 26, 1993, to December 1, 1993. Claimant underwent the second surgery on January 13, 1994. She testified that she returned to work following the second surgery sometime in February but does not give a date. The Appeals Board, therefore, awards

temporary total disability benefits from January 13, 1994, through February 1, 1994. This entitles claimant to a total of 13.29 weeks of temporary total disability benefits.

(4) Claimant developed bilateral carpal tunnel syndrome as a result of work activities in the course of her employment for the respondent. Claimant's work for respondent involved bagging 50-pound bags of dry powder, lifting, weighing, and twisting or pulling the bags. She developed soreness and swelling in her fingers, as well as aching in her elbow and shoulder.

In the course of subsequent medical treatment, claimant underwent surgery for carpal tunnel on both her left and right arms. The surgery on the left arm was performed by Dr. Anil K. Agarwal on November 26, 1993, and surgery was performed on the right on January 13, 1994, by Dr. David A. Clough. Claimant returned to work temporarily between the two surgeries and then again returned to work in the first part of February 1994. When she returned to work she initially performed work going through books and highlighting important matters. In April 1994 respondent attempted to return claimant to work on the butter line. She found she had problems with both wrists. She attempted to do office work but the repetitive movement caused the problems in her hands to become worse. On June 10, 1994, she received a letter indicating she had been terminated for economic reasons. Claimant, thereafter, attempted to work at a grocery store. She worked there for two weeks, but testified she could not do the job as well as before because of pain in her wrists and her arms falling asleep. Claimant has done no other work since June 1994 other than the two weeks of work at the grocery store.

Permanent partial general disability compensation is defined in K.S.A. 44-510e as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. "

The record contains only one opinion by a physician relating to claimant's loss of ability to perform tasks. Dr. Daniel Zimmerman testified that, in his opinion, claimant was no longer able to perform 70 percent of the tasks she had performed in her 15-year work history. Dr. Zimmerman rated claimant's functional impairment at 14 percent to the body as a whole. He recommended that she avoid tasks requiring lifting greater than 20 pounds occasionally or 10 pounds frequently and that she avoid frequent flexion, extension, twisting, torquing, and hammering. He reviewed a list of tasks prepared by Mr. Richard Santner. Claimant had, at the time of the regular hearing, confirmed that the list prepared by Mr. Santner was accurate.

Respondent argues that the opinion by Dr. Zimmerman should be considered unreliable in this case. Respondent insists that claimant has engaged in activities shown, by video tape surveillance, inconsistent with the restrictions recommended by Dr. Zimmerman. Respondent also points out certain aspects of the medical report by Dr. Brett Wallace, a court-appointed neutral physician, suggesting that claimant did not give maximum effort in performing certain tests.

The Appeals Board has reviewed the video tape, as well as the report and testimony of Dr. Wallace. While both raise questions, the Appeals Board does not consider either to be sufficient to cause complete disregard of Dr. Wallace's report and opinions of Dr. Zimmerman. The opinion of Dr. Zimmerman, therefore, remains the only

credible opinion in the record relating to task loss. Although the Appeals Board does not consider itself necessarily bound by that opinion, there appears no reason in the record of this case not to rely upon it. The Appeals Board does find it to be credible and adopts that opinion. The Appeals Board, therefore, finds that claimant has a 70 percent loss of ability to perform tasks that she had performed in her previous 15-year work history.

The record also reflects claimant is not earning a wage. The difference between what claimant was earning and what claimant is earning is, therefore, 100 percent. Respondent urges that we apply principles from *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277,887 P. 2d 140 rev. denied 257 Kan. 1091 (1995). In that case claimant had declined an offer for work that she could perform. The Court of Appeals applied the presumption of no work disability which existed prior to July 1, 1993, for persons who engage in work at a comparable wage. The Court of Appeals imputed the wage of the offered job which claimant had rejected.

The facts in this case are not conceptionally equivalent to those in the *Foulk* case. In this case claimant testified that she attempted to find work. She went to neighboring towns and applied for work. She applied at a Pizza Hut, nursing homes, Casey's, and other places. When her efforts were unsuccessful she opened a craft shop which has not yet produced enough income to pay her any wage. The difference between what claimant was earning at the time of the injury and what claimant is presently earning is 100 percent.

The Appeals Board recognizes that the evidence in this case includes evidence that claimant has the ability to earn wages. The ability to earn wages is, however, no longer the test for injuries after July 1, 1993. We do not believe the *Foulk* decision intended to reintroduce claimant's ability as a factor in determining work disability except for the limited circumstances where the claimant has refused to accept employment the claimant can perform.

K.S.A. 44-510e requires that the wage and task loss components be averaged. When those two components are averaged in this case the result is an 85 percent permanent partial general disability.

(5) Respondent has disputed the use of claimant's unauthorized medical expense allowance for the report of Dr. Zimmerman. Claimant indicates they do not claim the right to use unauthorized medical expense to pay for the report of the medical examination by Dr. Zimmerman. Claimant has submitted other medical expenses as unauthorized. The Appeals Board finds claimant is entitled to have those expenses paid up to the statutory maximum of \$500.

(6) Respondent disputes the previous order by the Special Administrative Law Judge requiring that it pay for costs of the independent medical examination by Dr. Wallace. The examination was ordered pursuant to provisions of K.S.A. 44-510e. The statute requires a referral to an independent health care provider when the parties do not agree on the functional impairment. Respondent is correct in this sense that there is no specific provision expressly stating who is to pay the cost of the independent medical examination or expressly authorizing the Special Administrative Law Judge to assess those costs. The Appeals Board, nevertheless, considers the Award to be within the jurisdiction of Special Administrative Law Judge. When the legislature required a referral to an independent health care provider, it cannot logically have assumed the examination would be done free of charge. In the absence of specific directions regarding payment of that expense, the Appeals Board considers it an inherent part of the powers of the Special Administrative Law Judge in connection with the referral to assess those costs against one or more of the parties.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Douglas F. Martin dated April 1, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Pamela Cooper, and against the respondent, Mid-America Dairymen, and its insurance carrier, Home Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred June 10, 1994, and based upon an average weekly wage of \$321 for 13.29 weeks of temporary total disability compensation at the rate of \$214.01 per week or \$2,844.19, followed by 352.75 weeks of temporary total disability compensation at the rate of \$214.01 per week or \$75,492.03, for an 85% permanent partial general disability, making a total award of \$78,336.22.

As of October 1, 1996, there is due and owing claimant 13.29 weeks of temporary total disability compensation at the rate of \$214.01 per week or \$2,844.19, followed by 107.28 weeks of permanent partial disability compensation at the rate of \$214.01 per week in the sum of \$22,958.99 for a total due and owing of \$25,803.18, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$52,533.04 is to be paid for 245.47 weeks at the rate of \$214.01 per week, until fully paid or further order of the Director.

The Appeals Board adopts as part of this Order all other orders entered by the Administrative Law Judge in his Award including the Order Nunc Pro Tunc requiring the Fund to pay 40% of all amounts awarded.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick R. Nichols, Topeka, KS
John David Jurcyk, Lenexa, KS
Bruce Brumley, Topeka, KS
Bryce Benedict, Administrative Law Judge
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director